

JUL 11 1969

JOHN F. DAVIS, CLERK

No. 776

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

UTAH PUBLIC SERVICE COMMISSION,

Appellant,

v.

EL PASO NATURAL GAS COMPANY, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

**PETITION FOR REHEARING
EL PASO NATURAL GAS COMPANY**

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**PETITION FOR REHEARING
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EL PASO NATURAL GAS COMPANY [El Paso] hereby respectfully petitions this Court for a rehearing of its decision of June 16, 1969 and a hearing on the merits in the above styled cause, on the grounds and for the reasons hereinafter set forth.

**I. EL PASO WAS NOT AFFORDED A HEARING ON
THE MERITS OF THIS CASE**

Fundamental fairness, this Court's Rules, and its prior decisions all require that a party be forewarned in some fashion if a court is going to pass on the merits of his claim, and require that he be given an opportunity to address himself to those merits. El Paso was not fore-

warned that this Court would pass on the merits of this case following oral argument on April 29, 1969, and it did not address itself to any but procedural questions. Accordingly, El Paso was denied an opportunity to brief or argue the merits.

On November 22, 1968, the Utah Public Service Commission [Utah] filed in this Court a Jurisdictional Statement which dealt solely with the question whether Colorado Interstate Gas Company [now Colorado Interstate Corporation; hereinafter CIG] was disqualified, for antitrust reasons, as a purchaser of the assets to be divested. On the morning of the final day on which motions answering that Jurisdictional Statement could be filed, Utah moved this Court to dismiss its appeal. El Paso had prepared and was ready to file a Motion to Affirm, but was informed by the Office of the Clerk of this Court that its Motion would not be received in view of Utah's Motion to Dismiss. Other appellees were similarly advised.¹

Almost immediately, this Court began to receive ex parte communications from persons neither parties to nor representing parties to these proceedings, urging that this Court hold a hearing to determine whether a hearing on the merits should be held notwithstanding Utah's wish to withdraw its appeal. On the basis of the information thus communicated, on April 21 the Court ordered that a hearing be held on April 29. In relevant part, that order read:

The motion of appellant to dismiss the appeal under Rule 60 and the motion of William M. Bennett for a hearing are set for oral argument on April 29, 1969.

¹ Solicitor General, transcript of oral argument at April 29 Hearing in *Utah Public Service Comm'n v. El Paso Natural Gas Co.* [hereinafter Oral Argument] at 33; Statement of Position of Northwest Intervenors in Response to Court's Order Dated April 21, 1969, at 2; Memorandum of Colorado Interstate Corporation, filed April 24, 1969, at 3.

The first motion thus set for hearing dealt with the question whether there would be an appeal in the first place. Obviously, if the Court granted Utah's motion to withdraw its appeal there would be no appeal on file. The second motion to be heard involved the request of an outside party to be given a hearing on the merits of the appeal. Therefore the Court's order posed only two questions: whether the merits of the case should be heard at all, and, if so, whether Mr. Bennett should be heard on the merits.

As the order clearly stated, then, the April 29 argument was for the purpose of determining whether there would or would not be a subsequent hearing on the merits. Aside from the consideration that the parties to an appeal to the Supreme Court of the United States should be entitled to rely on the Court's own statement of what questions are before it, every circumstance surrounding this hearing led El Paso to conclude that the issues were only those indicated by the plain meaning of the Courts' own words.

First, in view of the unusual nature of the proceeding ordered by the Court,² it was taken for granted that the Court was concerned about the unusual questions — the propriety of Utah's agreement with CIG, the Department of Justice's decision not to pursue its appeal, and perhaps CIG's qualification to acquire the assets to be divested under the anti-trust laws. Indeed, no other questions had been raised, except in a most peripheral and highly conversational way by Mr. Bennett, and this Court itself later declined to hold that his "papers" properly presented the question of compliance with *Cascade*. Furthermore, at the time this order was entered, the Court had before it nothing on behalf of the plaintiff, the defendant or CIG. Therefore, El Paso

² It is further evidence of the unusual and limited nature of that hearing that both the appellant and all the appellees shared time for argument on the same side.

assumed that the hearing was intended to give the actual parties to the litigation an opportunity to answer the charges leveled by the outsiders. Moreover, it would have been impossible for any party to have briefed — in the four days allowed³ — the questions the majority later decided. The record of the proceedings below filed in this Court was not even complete, let alone in a manageable form.⁴ Most important, it was this Court that directed that a new judge be selected to make “meticulous findings” in accordance with the guidelines it set forth in *Cascade*. It did not seem likely that this Court would disavow the considerable work undertaken at its direction without so much as holding a hearing for that purpose, or at the very least, giving adequate opportunity for briefing the question.

It was only reasonable to suppose, then, that this unique proceeding would be followed by a full-scale hearing on the merits if the Court were persuaded that Utah’s motion to withdraw its appeal should be denied or that Mr. Bennett’s motion for a hearing should be granted. In any case, neither El Paso nor any other party in fact briefed or argued the

³ All parties who inquired were advised by the Office of the Clerk of this Court to have their briefs on file by Friday, April 25, 1969.

⁴ One of the most important sets of documents involved, the so-called “Implementing Documents,” was inexplicably not transmitted to this Court as part of the record below. These documents include the agreement setting forth the terms of the sale of New Company to CIG, including the ratio for conversion of New Company Preferred stock into CIG common, the agreement governing the operation of New Company pending final divestiture, the cancellation of the Sumas Exchange Agreement, the San Juan Basin Gathering Agreement, and the provisions isolating El Paso from any exercise of control over New Company and CIG. The absence of these documents is undoubtedly responsible for the majority’s comment: “What the conversion ratio will be is not known; but, it is said, there will be provisions to restrict El Paso control over the New Company.”

questions the Court decided.⁵ And certain it is that the Court gave no indication that it intended to decide the entire case on the basis of this hearing. It nevertheless did so, without having heard argument or read briefs on the merits, and on the basis of an incomplete record. In so doing this Court violated its own rules.

⁵ A review of the oral argument clearly demonstrates the extremely limited nature of the proceedings, as understood by the parties. Thus, Mr. Romney, attorney for Utah, addressed himself entirely to the reasons why Utah decided to dismiss its appeal. He never even touched on the merits. Mr. Payne, on behalf of El Paso, stated precisely what he thought the issue was at the outset of his argument: "As I understand the questions which are before the court for discussion this morning, they relate to two questions. One, should the motion of Utah to dismiss the case be granted or denied, and secondly, should Mr. Bennett's motion for another hearing in the case be granted or denied." Oral Argument at 6. His understanding that any further decision on the merits would require additional proceedings is demonstrated by his comment that "The question then really should turn on whether this is the kind of case in which the court should reach down into the District Court proceedings and bring them up and reopen them." Oral Argument at 7. He concluded: "I strongly urge this court not to reopen these proceedings." Oral Argument at 11. Mr. Hooper on behalf of Cascade and seven other parties devoted virtually his entire argument to the fact that the District Court had selected the most viable available entity capable of serving the area and the one most likely to compete against the pipeline companies presently serving California. The two sentences from his argument quoted by the Court in footnote 2 of its opinion, when read in the context of the entire argument, clearly show Mr. Hooper's assumption that further proceedings necessarily would be involved if the Court denied Utah's motion to dismiss. Mr. Sonnett, on behalf of Colorado Interstate, devoted all of his argument to the single point that his client had never been a potential competitor in the California market. Mr. Skjeie, for the State of California, urged the Court to grant Utah's motion to dismiss, said that the Court should act quickly in view of the situation in that state, and set forth California's reasons for dismissing its own appeal. And finally, the Solicitor General recited step by step how he reached the decision on behalf of the United States not to appeal the District Court's selection of CIG as the successful applicant. At no point in his argument did he give the slightest hint that he thought that the division of assets or the mechanics of divestiture were in question.

This Court's Rule 16 provides that the appellee may file a motion to affirm. A motion to affirm is not a mere formality. On the contrary, as this Court held in *Bohanon v. Nebraska*, 118 U. S. 231, 233 (1886): "Upon a motion to dismiss we cannot consider the merits of the question on which our jurisdiction depends, and no motion has been made to affirm." It is inherent in the nature of a hearing on a motion to dismiss that a determination on the merits may not be made, and that principle is well settled in this Court. *E.g.*, *Minor v. Tillotson*, 42 U. S. 287, 288 (1843); *Hecker v. Fowler*, 66 U. S. 95, 96 (1862); *Sparrow v. Strong*, 70 U. S. 97, 105 (1866); *Ex parte McCardle*, 73 U. S. 318, 327 (1868).

El Paso's motion to affirm in this case would have been a vehicle for allowing it to argue the merits sufficiently so that the Court could, if it chose, make summary disposition of the case. The Court's refusal to dismiss Utah's appeal coupled with its rejection of El Paso's right to be heard — either through a motion to affirm or through other briefs and argument on the merits — denied El Paso the hearing to which it is clearly entitled under the Supreme Court's own rules.

In determining simultaneously that the appeal should be heard and that the District Court should be reversed, without affording any opportunity for the parties to be heard on the underlying merits, the Court also violated basic principles it has laid down in other cases. *E.g.*, *Garrison v. Patterson*, 391 U. S. 464 (1968); *Carafas v. LaVallee*, 391 U.S. 234 (1968); *Nowakowski v. Maroney*, 386 U.S. 542 (1967). In *Garrison* this Court held that a federal Court of Appeals could not hold a hearing on whether probable cause for appeal exists, determine that it does, and at the same time affirm the lower court's judgment

without giving the party adversely affected an opportunity to argue the merits of the appeal. This Court by a *per curiam* opinion said:

The principle underlying that decision [*Nowakowski v. Maroney, supra*] was that if an appellant persuades an appropriate tribunal that probable cause for an appeal exists, he must then be afforded an opportunity to address the underlying merits. This principle is no less applicable when a court of appeals, having received submissions relating only to probable cause and other procedural matters, decides that probable cause indeed exists. [391 U. S. at 466.]

The holding in *Garrison* does not require a court of appeals to receive briefs, hear oral argument, or hold separate hearings on the issues whether an appeal should be heard and whether the merits of the case warrant reversal. What is required, however, is that the parties be given fair notice and an adequate opportunity to argue the merits if such summary procedures are to be employed. "[T]he appellant must be afforded *adequate opportunity* to address the merits, and . . . if a summary procedure is adopted the appellant must be informed, by rule or otherwise, that his opportunity will or may be limited." 391 U.S. at 466 [Emphasis added.].

The substantive content of this instruction is made clear, at least for the purposes of the present case, by the facts set out in footnote 2 of the Court's opinion in *Garrison*. The question had arisen whether the merits had in fact been addressed at the one hearing the Court of Appeals held. It appeared that the merits had been discussed at that hearing to the extent necessary to show grounds for accepting the appeal, and that the petitioner had been given all the time for argument he wanted. It was considered decisive, how-

ever, that no rule or decision had been available which, if consulted, would have forewarned petitioner that a decision on the merits would be forthcoming from the procedural hearing. There was not only no such formal forewarning in the case at bar, there was no basis upon which counsel could have foreseen their peril.

Therefore, this Court held in *Garrison v. Patterson* that a federal appellate tribunal may not decide the merits of a case on the basis of a hearing disguised as a hearing to determine whether the merits should be heard at all. As this Court said there, the party adversely affected must be given an "adequate opportunity" to be heard. The order setting the hearing this Court held on April 29 gave no hint that it was to be a hearing on the merits. Within the meaning of *Garrison v. Patterson*, then, El Paso was not afforded an adequate opportunity to be heard.⁶

The principle of *Garrison v. Patterson* is plainly a principle of elementary fairness that ought to apply to all appellate proceedings.

II. THIS COURT'S RULINGS WERE BASED ON A MISUNDERSTANDING OF THE RECORD

There is another reason why this Court should not abridge its procedures in complex cases of this kind, of

⁶ This is not to argue that this Court cannot decide issues not briefed or argued to it in antitrust cases *after a hearing on the merits*. *Continental Ins. Co. v. United States*, 259 U. S. 156 (1922); *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U. S. 129 (1967). In that situation, the appellees are on notice that any aspect of the decision appealed from may be at issue, and the hearing on the merits affords them adequate opportunity to give such support to the decision as they feel necessary. Even where the Court affirms or reverses a trial court without argument in Expediting Act cases, it has before it both the appellant's Jurisdictional Statement and the appellee's Motion to Affirm or to Dismiss.

equal rank with the question of fairness to the litigants. By depriving itself of the opportunity to hear argument and to read briefs on the merits of a difficult case, any Court inevitably opens the way for misunderstandings of the record. It is submitted that this Court's rulings in this case are based on erroneous conclusions of fact which in turn are traceable to the summary approach it employed. In at least one respect, the Court entered a ruling which is wholly inconsistent with its own mandate.

The following are examples of issues which would have been fully explored had the parties had the opportunity to do so. Because of a lack of such opportunity, this Court fell into what El Paso respectfully submits was substantial error.

1. **A "reallocation" of San Juan Basin gas reserves is not feasible, and is not necessary to accomplish the objectives of Cascade.**

Three considerations, based on facts established below, make the Court's intentions regarding the disposition of gas reserves on remand unclear. This Court stated that there must be a "reallocation" of gas reserves, particularly of those in the San Juan Basin, in order "to place the New Company in the same relative position vis-a-vis El Paso in the California market as that which Pacific Northwest enjoyed immediately prior to the illegal merger."

First, the District Court followed carefully this Court's instructions in *Cascade* that the New Company must be given gas reserves "no less in relation to present existing reserves than Pacific Northwest had when it was independent," and that "the new gas reserves developed since the merger must be equitably divided between El Paso and the New Company." The District Court in fact ordered El Paso to divest a greater percentage of reserves to New

Company than Pacific Northwest [PNW] had before the merger, including all the reserves that PNW brought into the merger. The divestiture ordered by the Court below gave New Company *over fifty percent* of the reserves the combined companies had developed since the merger.⁷

Second, it was established below that the San Juan Basin cannot physically support another pipeline to California. See T. 751-52, 756, 2383, 2669, 3486.⁷ There simply are no gas reserves in the San Juan Basin available for that purpose. All of the San Juan reserves are already flowing to certificated markets. All other gas reserves in proximity to New Company's pipeline were ordered divested to New Company.

This, then, is the meaning of the District Court's finding that El Paso's total system reserves cannot support the needs of El Paso's and New Company's existing customers, and at the same time provide enough gas to New Company to support a new project to California. *United States v. El Paso Natural Gas Company*, 291 F. Supp. 3, 20 (D. Utah 1968). The gas is not there. As the Court also found, "for New Company and El Paso to be competitors for future increments to the California market will require that *both* seek new reserves." 291 F. Supp. at 20 [Emphasis added.].

Third, it was established below that 400,000,000 cubic feet per day of new and otherwise uncommitted Canadian gas reserves are available to the New Company, over and above the reserves ordered to be divested by the Court below. This gas did not figure in the calculation leading to the conclusion that New Company's total system reserves are not sufficient to meet "the requirements of the New Company to serve the northwest division and to supply a project by which New Company would compete in the California market . . . 291 F. Supp. at 21-22. It will be re-

⁷ All testimony references are to the Transcript.

membered that it was with Canadian reserves that PNW mounted its only challenge to El Paso's position as the sole out-of-state supplier of gas to California. *United States v. El Paso Natural Gas Company*, 376 U. S. 651, 654 (1964). PNW never had enough San Juan Basin reserves to support a project to California. Instead PNW had a letter agreement from Westcoast Transmission Company whereby Westcoast agreed to make 250,000,000 cubic feet per day available to PNW, out of unspecified Canadian reserves, subject to further agreement on all terms and conditions of the sale. El Paso Exhibit 45. This was the gas PNW attempted to take to California. *United States v. El Paso Natural Gas Co.*, *supra* at 654. To restore New Company to PNW's competitive position vis-a-vis California, a similar commitment was obtained from Westcoast that 400,000,000 cubic feet per day of Canadian reserves would be available to New Company. El Paso Exhibit 46. These Canadian gas reserves are available to New Company on the same basis as PNW's Canadian reserves were available to it, and exceed the Canadian reserves committed to PNW by sixty percent. The practical feasibility of using these Canadian reserves to support a California project by New Company is attested to by CIG's announced plans to do so.⁸ The lower Court's decree, then, restored PNW's competitive potential to New Company in kind, but in greater degree.

On the facts established below, the "reallocation" the Court directs is not only not feasible but is not necessary "to place New Company in the same relative competitive

⁸ Oral Argument at 60. Since the hearing, plans for an enormous project to bring over a billion cubic feet a day to the U. S.-Canadian border have been announced. The principals in that project envision that part of this gas will form a gas supply for New Company to carry to California. *Wall Street Journal*, June 24, 1969.

position . . ." as PNW. To put it another way, any reallocation undertaken by the Court below pursuant to this Court's new mandate could only arrive at the same general result. It is respectfully submitted that this Court's ruling on gas reserves must therefore have been based on insufficient information.⁹

2. The method of divestiture decreed below conforms to the method of divestiture decreed in *United States v. E. I. du Pont de Nemours & Co.*

Against the factual background of this case, the Court's reliance on *United States v. E. I. du Pont de Nemours & Company*, 366 U. S. 316 (1961) to strike down the method of divestiture adopted below is clearly misplaced.¹⁰ Although it was not evident to the Court upon this incomplete presentation, the divestiture plan at bar is in complete

⁹ It might be helpful in passing to correct other factual misstatements found in this portion of the majority opinion. The District Court found that the passage of time had indeed made entry into the California market more difficult, and found that divestiture to any applicant other than CIG would benefit El Paso by weakening the competition of the New Company. The District Court did *not* find that the delay in resolving this case had strengthened El Paso's hold on the California market since 1957. In fact El Paso's "hold on the California market" has deteriorated since it acquired Pacific Northwest, as evidenced by the fact that *two* additional out-of-state suppliers have entered the California market, not one as this Court stated. Since 1957, El Paso has supplied less than one-third of the load growth of the California market. El Paso Exhibit 110.

¹⁰ The Court's insistence on a cash sale begins with the statement that no party argued that the Court below *did* order complete divestiture. The reason for this oversight is not difficult to find; no one realized that question was in issue. Surely it does not follow that everyone conceded that the Court below did *not* order complete divestiture. Certainly, El Paso did not intend to concede the point. And *no one* argued that "the disposition made by the District Court was the best that might be made without complete divestiture."

accord with *du Pont*. As the Court points out, the issue in *du Pont* was whether du Pont should be required to transfer all attributes of ownership of the 63,000,000 shares of General Motors stock it held to its stockholders or only the voting rights represented by those shares. It is true that this Court there required "complete divestiture," but the "complete divestiture" it is talking about allowed du Pont to divest its General Motors stock to its own shareholders. The divestiture before the Court now does the same thing, but with the addition of significant restrictions making it impossible for anyone to exert any influence on the management of both companies at the same time.¹¹ Furthermore, du Pont passed down to its shareholders voting common stock, whereas El Paso would pass down non-voting preferred stock, convertible after five years into CIG common, not New Company common. Neither El Paso nor its shareholders could ever have a direct voice in the affairs of the New Company. Thus, the majority states that "only a cash sale will satisfy the rudiments of complete divestiture" on the authority of a case that held that a divestiture plan less stringent than El Paso's constituted complete divestiture!

The Court's treatment of this problem suggests it was under a misapprehension about the facts in that it apparently believed that El Paso itself would retain a stock interest in the New Company. In fact, El Paso, as the transferor of the properties to be divested; would be the party to whom the New Company Preferred would initially be delivered. But the plan of divestiture envisioned that the New Company Preferred Stock would in short order

¹¹ The "Restrictive Provisions" formulated to accomplish this result are not before this Court and are too detailed to be summarized adequately; therefore, they have been included in their entirety as an Appendix to this Petition.

be passed down to El Paso's shareholder's, just as was done in *du Pont*.¹² El Paso would thus function solely as a conduit for the transfer of that stock to its 131,000 stockholders. For purposes of comparison, the "complete divestiture" in *du Pont* gave du Pont ten years to divest itself of all its General Motors stock.

If, as the Court has now said, "the same reasoning is applicable to the present case", then "retention by El Paso and its stockholders of the preferred stock" is no less a complete divestiture than was the retention by du Pont's stockholders of General Motors voting common stock.

3. The debt structures of El Paso and New Company were to be completely separate.

The majority opinion precludes the New Company from agreeing with the holders of the bonds and debentures currently secured by the properties to be divested, to substitute its own bonds and debentures for those of El Paso at substantially the same low interest rate. An incomplete presentation again led the Court into error; it was never intended that New Company would "assume" El Paso's debt in the sense the Court apparently understood. New Company would not pay interest to El Paso nor would it be liable to El Paso for a default on its debt. Neither would El Paso be in any way liable on New Company's debt. The plan was for El Paso to be released from so much of El Paso's indebtedness as was attributable to the properties to be divested, simultaneously with the issuance by New Company of its own bonds and debentures in like amount which would be secured by the property to be divested

¹² Revenue Ruling issued to El Paso on Oct. 23, 1968, filed with District Court and served on all parties by El Paso by letter of Oct. 30, 1968. The Ruling would allow El Paso to sell outright up to twenty percent of the New Company Preferred.

under New Company's mortgage. The debt was thus to be proportionately divided and completely severed. Simply stated, the end result of the transaction ordered by the District Court would have been two separate debt structures secured by different properties.

It cannot be forgotten that *Continental Insurance Company v. United States, supra*, the procedural precursor of the Court's decision here, was also the principal case governing the handling of debt obligations in antitrust divestiture cases. In that case, the defendant Reading Company created a new coal company to which it divested its illegally held coal producing properties, but itself took a mortgage from the new coal company secured by the divested properties and remained liable to the bondholders on the whole of the debt of the combined companies. In short, the new coal company was liable on its debt to the defendant and the defendant, in turn, was liable to the financial institutions. The Court held that this arrangement bound the companies together because it created an incentive on the part of the debtor coal company to favor the creditor railroad company with its shipping and prompted a "community of operation" between the two to avoid default under mortgage. Therefore, the Court ordered that the indebtedness of the combined companies be proportionately divided and split up, in precisely the way El Paso and New Company proposed to do here. As this Court said then, "By this arrangement the interest and joint obligations of the Reading Company and the Coal Company will be completely severed, and the purpose of this court carried out." 259 U.S. at 173.

This Court's conclusion that "assumption of \$170,000,000 of El Paso's indebtedness helps keep the two companies in league" is thus incomprehensible in light of the *Continental Insurance* case unless one assumes the Court was laboring

under a misconception of the facts. The only conceivable connection between the two companies under the lower Court's decree would be that the 130-odd institutions that hold El Paso's debt would also hold New Company's debt; one or more of these same institutions, of course, also own bonds and debentures of every gas transmission company in the United States.

Aside from the fact that this holding is not based on accurate information, it is disastrous from the point of view of the Court's own objectives. The average weighted interest cost on the debt the New Company would have obtained under the District Court's decree was 5.26 percent, because El Paso would in effect have been divesting to New Company its proportionate share of the low-cost debt of the combined companies, most of which was issued when interest rates were below five percent. Interest rates on recent comparable issues are approaching nine percent. If New Company is not allowed to share in this low-cost debt, it will have to fund its operations at present market,¹³ and incur an interest cost on the \$170,000,000 at least three percent higher. This will result in additional costs to the New Company in the range of \$5,000,000 annually, most of which will presumably be covered by immediate rate increases to the gas consumers in the Northwest. This rate increase will make the New Company immediately less competitive with the alternate fuel supply sources that proliferate in the Northwest. The high cost of its debt will, of course, also be reflected in the costs of any California project the New Company might propose and would put it

¹³ Utility regulatory commissions require that a high proportion of a public utility's total capitalization be represented by debt, because debt is "cheaper" than equity and thus results in lower rates to the consumer. *American Telephone & Telegraph Co.*, 70 P.U.R. 3d 129 (1967); *Panhandle Eastern Pipe Line Co.*, 40 F.P.C. 98 (1968).

at a serious competitive disadvantage in attempting to serve that market.

In no sense, then, can the "assumption" of \$170,000,000 of debt at three to four percent below current market be considered as some sort of onerous burden El Paso succeeded in foisting off on the New Company. This low cost funding arrangement was regarded by all as one of the most attractive features of the plan of divestiture ordered by the Court below.¹⁴ Indeed, every Applicant for Acquisition below viewed the debt "roll-over," as it was called, as critical to the economic viability of the New Company and as an indispensable prerequisite of their respective plans for acquisition. See, e.g., T. 4254.

No one of the thirty-four participants below saw any anti-competitive potential lurking in the *Continental Insurance* roll-over arrangement adopted by the Court below, or anywhere at anytime even hinted that what the Court has now done might be appropriate. This Court's decision to alter radically the one absolutely uncontroversial feature of this divestiture will succeed only in saddling the New Company with a competitive disadvantage and the gas consumers of the Northwest with a huge financial burden.

III. CONCLUSION

We respectfully suggest that all of the factual misunderstandings and oversights could have been avoided if the parties had been given an opportunity to brief and argue the merits of this case. Instead, by proceeding as it did, the

¹⁴ As the financial witness for one applicant observed, "I would like to have, quite frankly, as much of that 5.26 money as I could get . . ." T. 6745.

Court not only violated El Paso's right to a hearing but ruled in a fashion that will defeat the very rights it was attempting to protect.

This case is far too important, not just to the immediate parties, but to the consumers in a large area of our country, to be decided in such a short time, after an inadequate presentation, and on the basis of a misunderstanding of some of the most basic and relevant facts upon which the result must hinge. Only a rehearing will assure that these consumers are accorded the advantages and protection which the Court intended to bestow. We urge that rehearing be granted so that a hearing on the merits may be held.

Respectfully submitted,

EL PASO NATURAL GAS COMPANY

By

LEON M. PAYNE

Counsel of Record

CERTIFICATE OF GOOD FAITH

I, Leon M. Payne, Counsel of Record for Petitioner El Paso Natural Gas Company, hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

.....
Leon M. Payne
Counsel of Record
El Paso Natural Gas Company

July 10, 1969

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APPENDIX

RESTRICTIVE PROVISIONS

El Paso and Colorado Interstate have agreed, subject to the approval of the Court, that the following restrictive provisions should be included in the Court's Final Order in this cause.

1. Definitions

a. The term "El Paso" shall mean El Paso Natural Gas Company, a Delaware corporation, or any successor.

b. The term "El Paso Affiliate" shall mean any Person directly or indirectly controlling, controlled by, or under common control with El Paso.

c. The term "Immediate Family" shall mean with reference to any individual person, the spouse, descendants, ascendants, brothers and sisters of such person.

d. The term "Person" shall mean any individual, partnership, association, joint-stock company, business trust, or organized group of persons, or other legal or business entity whether incorporated or not; or any receiver, trustee or other liquidating agent of any of the foregoing in his capacity as such.

e. The term "Holder of Record Only" shall mean, with reference to shares of stock of any corporation, any person who holds such shares solely of record as broker, pledgee, trustee, agent or otherwise in a representative capacity which carries no beneficial interest in such shares.

f. The term "Northwest" shall mean Northwest Pipeline Corporation, a Delaware corporation, or any successor.

g. The term "Northwest Preferred Stock" shall mean the preferred stock of Northwest to be issued to El Paso in exchange (in part) for the assets to be divested by El

Paso pursuant to the plan of divestiture ordered by the Court.

h. The term "Original Issue Date" shall mean the date on which the shares of the Northwest Preferred Stock shall first be issued.

i. The term "Colorado Interstate" shall mean Colorado Interstate Corporation (formerly Colorado Interstate Gas Company), a Delaware corporation, or any successor.

2. Restrictions Against Exchange of Northwest Preferred Stock

a. Neither El Paso nor any El Paso Affiliate may exchange any Northwest Preferred Stock for Colorado Interstate Common Stock.

b. The Northwest Preferred Stock may be redeemed (at the option of the holder thereof) by Northwest for Colorado Interstate Common Stock only upon presentation to Northwest or its agent of a certification by the holder thereof (or, in the event such holder is a Holder of Record Only, a certification by the beneficial owner thereof) to the effect that such holder (or beneficial owner):

(i) is not an officer or director of El Paso or of an El Paso Affiliate;

(ii) does not beneficially own, control or hold with power to vote, directly or indirectly, in excess of one-half of one per cent ($\frac{1}{2}$ of 1%) of the then issued and outstanding shares of the common stock of El Paso;

(iii) is not a member of the Immediate Family of any officer or director of El Paso or, to the best of the information, knowledge and belief of such holder, of any person who beneficially owns, controls or holds with the power to vote, either directly or indirectly,

in excess of one-half of one per cent ($\frac{1}{2}$ of 1%) of the then issued and outstanding common stock of El Paso;

(iv) is not acting for, or on behalf of any Person hereby precluded from redeeming Northwest Preferred Stock; and

(v) is not acting in concert, agreement or understanding with any other Person, but is acting in good faith solely in such holder's (or in such beneficial owner's) own behalf.

3. Restrictions Against Acquisition of Northwest Common Stock and Colorado Interstate Common Stock

No person who is an officer or director of El Paso or of an El Paso Affiliate, shall be permitted to purchase or retain any of the common stock of Northwest or to purchase or retain more than one-tenth of one per cent (0.1%) of the then outstanding common stock of Colorado Interstate; nor for a period of ten years from the Original Issue Date shall any Person who, in the aggregate with members of his Immediate Family and with any Person with whom he is acting in concert, agreement or understanding and with any Person for whom or on whose behalf he is acting, beneficially owns, controls or holds with power to vote, either directly or indirectly, in excess of one-half of one per cent ($\frac{1}{2}$ of 1%) of the then outstanding common stock of El Paso, be permitted to purchase or retain any of the common stock of Northwest nor to purchase or retain more than five per cent (5%) of the then outstanding common stock of Colorado Interstate. The Attorney General of the United States shall have access to the stock transfer of books and records of El Paso, Northwest and Colorado Interstate for the purpose of enabling him to enforce compliance with this provision. Nothing herein contained shall

extend to any Holder of Record Only of stock of El Paso, Northwest or Colorado Interstate.

4. Further Restrictions

a. Except as contemplated in the plan of divestiture ordered by the Court, El Paso and its Affiliates are hereby enjoined from acquiring any capital stock or financial interest whatsoever in Colorado Interstate or in Northwest or any assets of either, except such assets as might pass between El Paso and Colorado Interstate or between El Paso and Northwest in the ordinary course of their respective businesses.

b. For a period of ten years from the Original Issue Date, and except as contemplated by the plan of divestiture ordered by the Court, El Paso shall not acquire or hold after such acquisition, directly or indirectly, any of the outstanding common stock of Westcoast Transmission Company, Limited or any of the outstanding common stock of Northwest Production Corporation.

c. El Paso shall not have any person as an officer or director who is at the same time:

(i) an officer, director or employee of Northwest or Colorado Interstate;

(ii) the owner of any common stock of Northwest or more than one-tenth of one per cent (0.1%) of the outstanding common stock of Colorado Interstate or a person all members of the Immediate Family of which own in the aggregate more than one-tenth of one per cent (0.1%) of the common stock of Northwest or more than two-tenths of one per cent (0.2%) of the common stock of Colorado Interstate.

d. El Paso shall not employ, during a period of five (5) years from the Original Issue Date, any employee of Northwest without first obtaining the consent in writing of Northwest.

e. El Paso, its Affiliates, officers and directors are hereby enjoined from exercising the voting rights accorded the holders of the Northwest Preferred Stock as set forth in subparagraph (b) of paragraph 5 of the Certificate of Amendment of the Certificate of Incorporation of Northwest attached as exhibit to the Agreement dated, 1968, between El Paso, Colorado Interstate and Northwest on file in this cause, should such voting rights arise while such stock is held by them.